STATE OF MICHIGAN

COURT OF APPEALS

CLINTON LUCAS and ROBYN LUCAS, Plaintiffs-Appellants, v NORTON PINES ATHLETIC CLUB, INC., and DAVID SWINBURNE, Defendants-Appellees.	UNPUBLISHED June 10, 2010 No. 289685 Muskegon Circuit Court LC No. 08-45745-NO

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the grant of summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). We affirm.

This appeal arises from an accident that occurred at defendant Norton Pines Athletic Club (hereinafter "the Club"). Plaintiff Clinton Lucas (hereinafter "plaintiff") suffered injuries after falling approximately 20 feet from the Club's indoor rock climbing wall. At the time of the accident David Swinburne, an employee of the club, was monitoring the climbing wall.

When initiating their membership with the Club, plaintiffs executed a Participant Release of Liability and Assumption of Risk Agreement that provided, in relevant part, for a "release and . . . discharge" of the Club and its employees from any claims of injury "which may occur from any cause during such participation and/or use of the facilities." The Release also included a specific acknowledgement that the member assumed the risk of participation in activities at the Club. However, the Release specifically did not cover claims "arising from the willful or wanton negligence of Norton Pines Athletic Club or its officers, agents, or employees." In addition before engaging in climbing of the rock wall, each member of the Club was required to execute a Climbing Wall Release of Liability, which also included an acknowledgement regarding the assumption of risk of the member in participating in this activity and discharged the Club and its employees "from any and all claims, demands, actions, or causes of action on account of injury or death to myself . . . which may occur from any cause during such participation and/or use of the facilities." The Club also posted Climbing Wall Rules and Regulations, which required each member climbing the rock wall to wear a harness that must be attached with metal carabiners to tethers that descend from an auto-belay, or safety mechanism, which are secured to the wall. A climber's release of his or her grip from the climbing wall engages the auto-belay mechanism, which serves to lower the climber in a slow and safe manner to the ground. The Club's posted

Climbing Wall Rules require that "[o]nly a Norton Pines staff member is allowed to hook and unhook climber to and from the belay," and "[o]nly a Norton Pines staff is allowed to check the safety of equipment after it is put on."

Plaintiff was an experienced climber and had developed a routine or practice with Swinburne that would permit plaintiff to secure his own clip onto the harness and ascend the wall after making eye contact with Swinburne to visually verify that plaintiff's harness was properly attached to the auto-belay system. On the day of plaintiff's fall, he and Swinburne had followed this routine a number of times. However, on his last climb, plaintiff ascended the wall without clipping the harness to the auto-belay system or making eye contact with Swinburne to indicate that he was initiating his climb. Swinburne was in the vicinity, but reading a magazine when plaintiff commenced his climb. Plaintiff lost his grip on the wall and, without attachment to the safety mechanism, fell approximately 20 feet to the ground, incurring injuries.

Plaintiffs filed suit against both Swinburne and the Club alleging several counts of general negligence and reckless misconduct. Defendants sought summary disposition, pursuant to MCR 2.116(C)(7) and (C)(8), arguing there was no genuine issue of material fact based on plaintiff's assumption of risk and the execution of valid releases and waivers. The trial court initially granted summary disposition only on plaintiffs' general negligence claims and denied defendants' request for the dismissal of plaintiffs' reckless misconduct claim. On reconsideration the trial court subsequently dismissed plaintiffs' reckless misconduct claim and this appeal ensued.

Initially, we note that the various waivers and releases signed by plaintiffs precluded his claims of ordinary negligence. Specifically, "A contractual waiver of liability also serves to insulate against ordinary negligence, but not gross negligence." *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003), citing *Lamp v Reynolds*, 249 Mich App 591, 594; 645 NW2d 311 (2002). Notably, the various releases signed by plaintiffs indicate a waiver of liability for general negligence but not "willful or wanton negligence" or misconduct, which is defined in case law as being established "if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Xu*, 257 Mich App at 269 n 3 (citation omitted).

Plaintiffs have pleaded only general negligence and reckless misconduct. On appeal, plaintiffs do not challenge the dismissal of their general negligence claims but assert error in the trial court's grant of summary disposition on their claim of reckless misconduct. Plaintiffs contend that the trial court erred in limiting their claim of reckless misconduct only to injuries caused by a "co-participant" in a recreational activity rather than applying this standard to encompass all recreational activities as implied in *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 89 n 9; 597 NW2d 517 (1999), which provided:

> We recognize that we have stated this standard broadly as applying to all "recreational activities." However, the precise scope of this rule is best established by allowing it to emerge on a case-by-case basis, so that we might carefully consider the application of the recklessness standard in various factual contexts.

Contrary to plaintiffs' position, the Court's ruling in *Ritchie-Gamester* was very specific, stating in relevant part:

> [W]e conclude that *coparticipants* in a recreational activity owe each other a duty not to act recklessly. Because the trial court properly concluded that plaintiff could not show that defendant violated this standard, summary disposition was proper. [*Id.* at 95 (emphasis added).]

Based on the factual circumstances of this case, there is no basis to assert reckless misconduct as a basis for imposition of liability as Swinburne is merely the employee of a venue housing a recreational activity and not a coparticipant. Accordingly, the trial court correctly found that the case at hand is not analogous to *Ritchie-Gamester* and properly dismissed plaintiffs' claim of reckless misconduct.

Further, even if Swinburne could be construed as a co-participant, his failure to act does not rise to the level of reckless misconduct, which is defined as:

> "One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the wilful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not." [*Behar v Fox*, 249 Mich App 314, 319; 642 NW2d 426 (2002) (citations omitted).]

There was no evidence presented of any affirmative or assertive behaviors by Swinburne to support an assertion of reckless conduct. At most, Swinburne was negligent because he was inattentive to plaintiff's activity at the initiation of his climb. Swinburne's complicit participation with plaintiff in ignoring the rules and regulations for the rock-climbing wall could only be construed as ordinary negligence based on their having established a mechanism or procedure to assure plaintiff's safety while climbing. While the procedure followed deviated from the Club's policy it does not evidence a level of willfulness or indifference necessary to establish reckless misconduct.

Plaintiffs also contend that the trial court erred by making findings of fact and failing to construe the evidence most favorably to the party opposing summary disposition. A trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition, and all reasonable inferences must be drawn in favor of the nonmovant. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). Defendants sought summary disposition in accordance with MCR 2.116(C)(7). In deciding a motion based on that sub-rule, a trial court may consider "affidavits, depositions, admissions, or other documentary evidence" that would be admissible at trial. MCR 2.116(G)(2); *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

Specifically, plaintiffs argue that the trial court erroneously found, as an undisputed fact, that plaintiff and Swinburne had adopted an "eye contact protocol" and that reasonable minds

could not conclude that Swinburne's behavior had exceeded ordinary negligence. According to plaintiffs, acceptance of the use of an "eye contact protocol" is contrary to the facts established by the record based on the Club having established and posted a formal procedure for securing climbers in its "Climbing Wall Rules & Regulations" coupled with Swinburne's acknowledgment that this policy was mandatory and that he lacked the authority to override or ignore that policy.

Swinburne and plaintiff both admitted that the procedure they had adopted using eye contact was a deviation from the Club's written rules. However, Swinburne and plaintiff also testified that they believed the "eye contact protocol" was appropriate due to plaintiff's climbing experience and because it achieved the intended goal of verifying that plaintiff was properly attached to the tether. The trial court properly considered this evidence and construed it in a light most favorable to plaintiff. The only reasonable construction of the evidence was that Swinburne and plaintiff had developed their own protocol to insure that plaintiff was securely attached to the safety mechanism, albeit contrary to the Club's rules and regulations. This did not comprise improper fact-finding by the trial court.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot